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Supreme Court, U.S.
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NO. 02-1764

IN THE
SUPREME COURT OF THE UNITED STATES

SOB, Inc., a Minnesota corporation, d/b/a Sugar Daddy's; Amy Chenoweth; Shannon Wiborg; Kathryn Haskins; Mark Van Gelder; and Mary Clifford Van Gelder,

Petitioners,

vs.

County of Benton,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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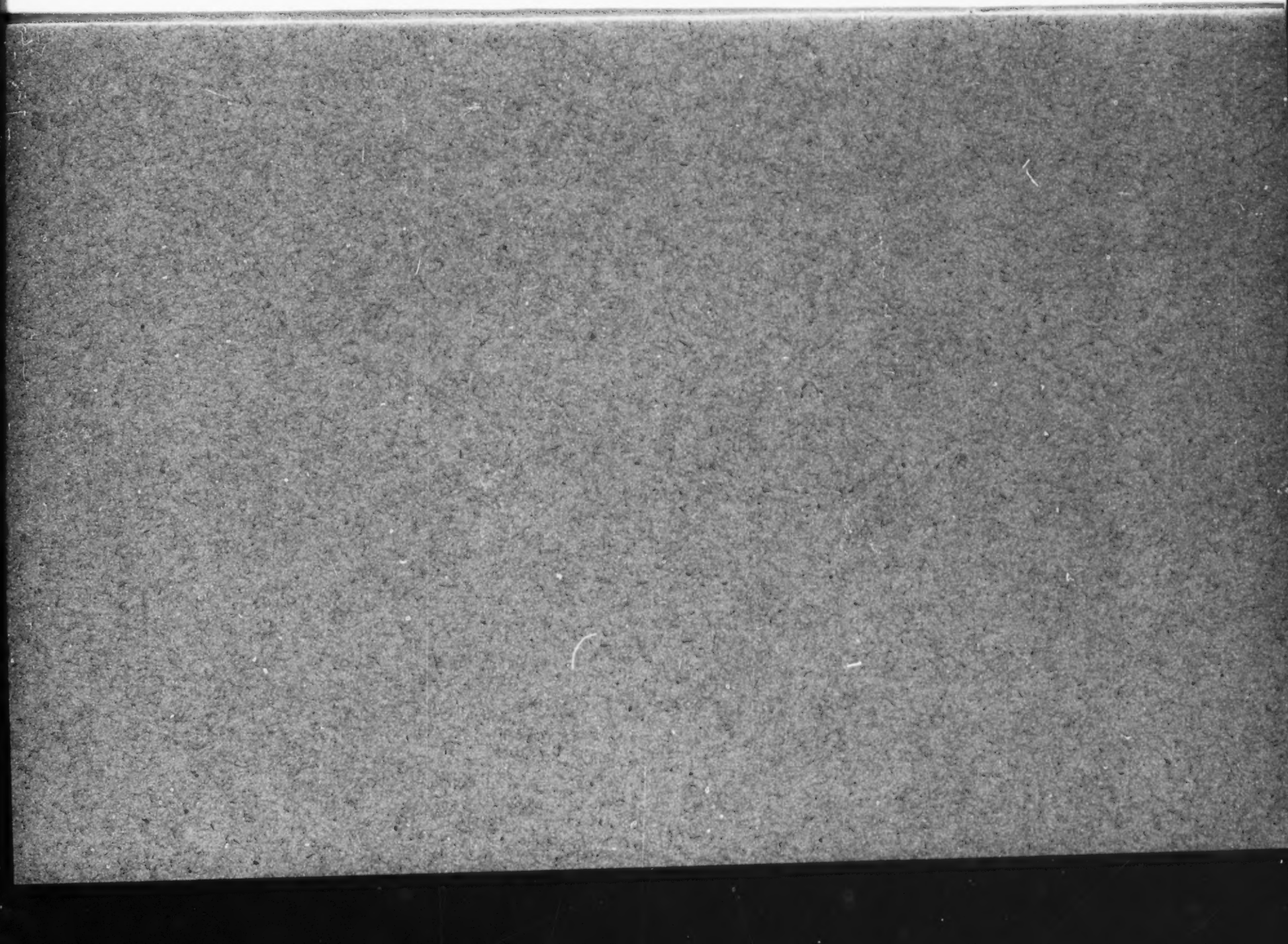

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INTRODUCTION

This brief if filed for two purposes: First of all, as a reply brief, pursuant to Supreme Court Rule 15.6, to reply to Respondent's brief in opposition; secondly, as a supplemental brief, pursuant to Supreme Court Rule 15.8, to bring to the Court' s attention the fact that the decision in the above-entitled matter is now in conflict with a decision of another United States Court of Appeals on the same important matter, within the meaning of Supreme Court Rule 10(a). To the extent that any arguments advanced in the brief in opposition are not specifically addressed in this reply and supplemental brief, such omission should not be considered in agreement with or concession of the validity of said arguments, but rather as only reflecting Petitioners' position that the argument is dealt with adequately in the original petition.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE FAILURE OF THE COURT OF APPEALS TO EMPLOY THE BURDEN-SHIFTING STANDARD ADOPTED BY THE PLURALITY OPINION IN *CITY OF LOS ANGELES V. ALAMEDA BOOKS.*

A. THE REFUSAL OF THE EIGHTH CIRCUIT TO ADOPT THE BURDEN-SHIFTING PROCEDURE OF *ALAMEDA BOOKS* PLACES IT IN DIRECT CONFLICT WITH THE DECISION OF THE ELEVENTH CIRCUIT ON THE IDENTICAL ISSUE.

Since the submission of the petition for writ of certiorari, the United States Court of Appeals for the Eleventh Circuit has decided a case involving the identical issue, and reached a conclusion directly contrary to the Eighth Circuit. In *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fl.*, ___F. 3d ___, 2003 W.L. 21649675 (11th Cir. July 15, 2003), the court reversed a grant of summary judgment to the County of Manatee, in a constitutional

challenge to both the county's adult entertainment zoning/regulation ordinance, and the county's public nudity ordinance, holding that under *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002), summary judgment was inappropriate.

The Eleventh Circuit discusses *Alameda Books* as follows:

> "The significance of *Alameda Books* is that it clarifies how the court is to interpret the third step of the *Renton* analysis as well as the second prong of the *O'Brien* test, which are, to a certain extent, virtually indistinguishable. In deciding whether a given ordinance 'is designed to serve' (*Renton*) or 'furthers' (*O'Brien*) the government's alleged interest in combating the negative secondary effects associated with adult entertainment, the standard we apply is the one described in *Renton* and utilized in *Barnes*, *Pap's*, *A.M.*, and *Alameda Books*. According to this standard, the government need not conduct local studies or produce evidence independent of that already generated by other municipalities to demonstrate the efficacy of its chosen remedy, 'so long as whatever evidence [it] relies upon is reasonably believed to be relevant to the problem that [it] addresses. [Citations omitted.] However, the government's evidence 'must fairly support [its] rationale.' [Citations omitted.] Further, Plaintiffs' challenging the ordinance after passage must be given opportunity to 'cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale, or by furnishing evidence that disputes the municipality's factual findings.' [Citation and footnote omitted.]." 2003 W.L. 21649675 at *10.

In reversing the grant of summary judgment on the public

nudity ordinance, the court noted that the ordinance , like the ordinance in the instant case"prohibits public nudity across the board and not just nudity occurring in adult entertainment establishments," and that the county expressly relied upon its determination that public nudity "increases incidents of prostitution, sexual assaults and batteries, [and] other criminal activity." In so doing, the county relied upon a report if the Florida Family Association, which included many of the studies relied upon by the county in the instant case. The Eleventh Circuit held that the county's findings and evidence were sufficient to "satisfy the pre-enactment burden as set forth in *Renton* and reaffirmed in *Pap's, A.M.*" [Citation omitted.] Id. at *13.

However, the Plaintiffs in that case directly contradicted this conclusion with satisfactory health and safety inspection reports of the Plaintiffs' businesses; incident reports of criminal activity showing lower crime rate near Plaintiffs' businesses than surrounding businesses; sales and assessment data revealing an increase in property values for property near the business; an award given to the Peek-A-Boo Lounge by the county sheriff for "outstanding contribution of the community"; and three expert studies specifically addressing local conditions in Manatee County showing no evidence connecting adult business with negative secondary effects. Id. at *13-14.

In reviewing this record, the court stated:

> "Taken together, the Adult Lounges argue that this evidence 'casts direct doubt' on the County's alleged rationale in enacting ordinance 99-18 'by demonstrating that [the county's] evidence does not support its rationale' and 'by furnishing evidence that disputes the [county]'s factual findings.' [Citation omitted.] Given the record and procedural posture of this case, we are inclined to agree. Although Manatee County met its minimal initial burden under *Renton* to rely on evidence it reasonably believed to be relevant to addressing the

> problem of secondary effects, in this case Appellants have successfully cast doubt on the county's rationale by placing into the record substantial and unanswered factual challenges to the County's findings in the specific areas of crime, decreased property values, aesthetic blight and other secondary effects." Id. at *14.

Clearly, the Eleventh Circuit in *Peek-A-Boo Lounge* reaches absolutely the opposite conclusion of the Eighth Circuit in the instant case, when, confronted with essentially indistinguishable evidence as to the absence of secondary effects on both a local and national scale, invoked the burden-shifting procedure of *Alameda Books*, and found summary judgment for the county to be inappropriate.[1]

B. THE OTHER ARGUMENTS ADVANCED BY RESPONDENT FOR REJECTING THE WRIT ARE MERITLESS.

The most obvious fact about Respondent's other arguments

1The *Peek-A-Boo Lounge* decision also reflectively refutes the distinction by Respondent in n.7 of its brief in opposition, when it attempts to distinguish *Flanigan's Enterprises v. Fulton County, Ga.*, 242 F. 3d 976 (11th Cir. 2001), cert. denied, 536 U.S. 904 (2002). Respondent attempted to distinguish *Flanigan's Enterprises* by the court's dicta that the county could enact a ban on all public nudity since this Court "has upheld that." Id. at 987. From this dicta, Respondent concludes that the Eleventh Circuit "would have decided the issue differently if the ordinance was a public nudity ordinance." *Peek-A-Boo Lounge* did in fact involve a public nudity ordinance. Nonetheless, the court held summary judgment for the county to be inappropriate and invoked the burden-shifting process of *Alameda Books*.

as they relate to the failure of the Eighth Circuit to invoke the *Alameda Books* burden-shifting procedure is the fact that Respondent is clearly defending a decision which the Eighth Circuit never made. As noted in the original petition, the Eighth Circuit held that Petitioners' factual challenge to the basis for enacting the ordinance in question was insufficient to case doubt on the county's rationale for enacting the ordinance for two reasons: First of all, the Eighth Circuit asserted that Petitioners' evidence, as it related to a decline in property values and an increase in crime in the surrounding neighborhood, related to zoning, rather than public nudity,[2] and secondly, that public nudity was held to "foster illegal activity, such as drug use, prostitution, tax evasion and fraud." *SOB, Inc. v. County of Benton*, 317 F. 3d at 863, Appendix at A. 14-15.

Respondent makes no attempt to defend that decision. Respondent does not dispute Petitioners' uncontradicted evidence that over an 8-year period at two adult entertainment establishments there has never been an arrest for drugs or prostitution. Respondent does not suggest how these secondary effects can be reduced to less than zero. Equally significantly, Respondent does not suggest any reason why this Court should engage in another "titanic surrender to the implausible,"[3] by suggesting that the wearing of pasties and G-strings will somehow make more honest taxpayers out of anyone.

Rather, Respondent challenges the factual showings made by Petitioners on grounds neither relied upon by the Eighth Circuit and expressly rejected by the District Court.[4]

2As already noted above, this proposition was clearly rejected by the Eleventh Circuit in *Peek-A-Boo Lounge*, supra.

3See *City of Erie v. Pap's A.M.*, 120 S. Ct. at 1409, Stevens, J. dissenting.

4See District Court findings of fact 9 and 10, specifically finding, based upon the entire record, that the presence of live

Rather, Respondent asserts that in *City of Erie v. Pap's A.M.*, supra, this Court, in its plurality opinion, asserted that the study done by Paul, Linz & Shafer, pointing out the inherent unreliability of virtually all studies relied upon by municipalities in this regard, was deemed insufficient to cast doubt on the municipality's finding of adverse secondary effects in that case. See 529 U.S. at 298. However, it is absolutely clear that Justice O'Connor made her remarks in *Pap's*, in the context of an adult entertainment Plaintiff which, at not stage of the proceedings, contested the city's findings that adult entertainment causes adverse secondary effects. See 120 S. Ct. at 1396.

By contrast, in *Alameda Books*, Justice O'Connor specifically permitted an adult entertainment Plaintiff to "cast direct doubt" on the municipality's rationale "by demonstrating that the municipality's evidence does not support its rationale..." 535 U.S. at 438-439.

Plainly, the submission of uncontradicted evidence[5] is certainly sufficient under *Alameda Books* to invoke burden-shifting, especially un-supplemented by the other evidence in the record.[6]

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nude entertainment has not caused secondary effects and that the county's motivation in adopting the ordinance "was to disrupt or eliminate businesses in Benton County that offer live, nude entertainment." Appendix at A.33.

5Conspicuous by its absence from this record is any evidence or argument by Respondent refuting the Paul, Linz & Shafer conclusion that the methodologies used by the studies relied upon by the county were too unsound and unreliable to permit the drawing of any conclusion related to adverse secondary effects.

6In addition to the evidence which Respondent does discuss, Respondent does not dispute that Petitioners submitted

Nor does Respondent seriously dispute the crime evidence, although it attempts selectively to manipulate that evidence to reach a contrary conclusion. The raw data were that Rumor's Bar, with no adult entertainment, had 9 police calls within a year; King's Inn, with approximately double the size and seating capacity of Rumor's had 12 such calls; Sugar Daddy's (another adult entertainment facility), 28, and the Conoco station had 32. Appendix at A.80. Obviously, one could look in isolation and determine that Sugar Daddy's had more police calls than Rumor's Bar. However, it is clear from looking at the raw data that there is no correlation between the type of entertainment offered and the number of police calls. The convenience store had more calls than either of the adult entertainment facilities. The convenience store had 3 controlled substance investigations, compared to none for the adult entertainment facilities. Id. This clearly does not support and conclusion that there is anything particularly criminogenic about adult entertainment facilities.[7]

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evidence of studies conducted under methodologically sound criteria in Fulton County, Gorgia., Charlotte/Mecklenberg County, North Carolina; and Fort Wayne, Indiana, all of which concluded there was no evidence that adult entertainment facilities caused any adverse secondary effects. Respondent advances no arguments as to why these studies do not cast direct doubt on the county's rationale, "by furnishing evidence that disputes the municipality's factual finding," within the meaning of *Alameda Books*.

7Obviously, the most profound statement ever made concerning the relationship between land use and crime was the answer famous answer given by Willie Sutton as to why he robbed banks: "because that's where the money is." Obviously, any commercial use, "where money is," will generate more crime than vacant land or residential uses, where money isn't. The issue is not whether adult entertainment will generate more crime than vacant land or

II. THE CUSTODIAL ARREST ISSUE IS AN IMPORTANT AND SIGNIFICANT ONE, UPON WHICH THE COURT SHOULD RULE.

Three important points should be made concerning the custodial arrest issue:

The first is that, even an examination of the authority relied upon by Respondent plainly reveals that, while there is as of yet, no conflict between United States Courts of Appeals and State Supreme Courts over the issue, lower courts are clearly divided and resolution by this Court is necessary. In particular, the court in *Alexis, Inc. v. Pinellas County, Fla.*, 194 F. Supp. 2d 1336, 1345 (M.D. Fla. 2002) noted:

> "[S]everal courts addressing similar circumstances have denounced the full custodial arrests of exotic dancers for violating public indecency or obscenity ordinance as violative of First Amendment principals. See *Attwood v. Purcell*, 402 F. Supp. 231 (D. Ariz. 1975); *SOB, Inc. v. County of Benton*, 171 F. Supp. 2d 978 (D. Minn. 2001);[8] *Admiral Theater v. City of Chicago*, 832 F. Supp. 1195 (N.D. Ill. 1993); *People v. Adais*, 114 Misc. 2d 773, 452 N.Y. S. 2d 543 (N.Y. Crim. Ct. 1982).

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residential uses; of course it will. The issue is whether the content of entertainment shown generates more crime than any other commercial use. The evidence in this record clearly indicates the answer to be negative.

8Obviously, this was the District Court decision in the above-entitled matter.

> [Footnote omitted.][9] While the Supreme Court has yet to squarely address the issue, as discussed below, it has recognized a significant interplay between the First, Fourth and Fifth Amendments in these matters. [Citations omitted, emphasis supplied]"

Obviously, the conflicting opinions in lower courts is precisely why resolution by this Court is necessary.

Secondly, Respondent asserts that "[s]imply because two juries have determined reasonable doubt existed as to whether the dancers violated the Ordinance does not indicate the officer lacked enough objective information to issue a citation for a violation of the ordinance." Respondent's brief at p. 19. However, the issue is not whether the arresting officer did or did not have probable cause to make that custodial arrest, but rather whether an arresting officer, unguided by a neutral and detached magistrate, should be the one making that decision in the first instance. As noted in the original petition, under this Court's decisions in *Lee Art Theater, Inc. v. Virginia,* 392 U.S. 636 (1968), and *Roadan v. Kentucky,* 413 U.S. 496 (1973), where a seizure of communicative material acts as a prior restraint on presumptively protected speech, as does a custodial arrest of a live performer, the decision to restrain speech must be made by a neutral and detached magistrate, not a police officer. The fact that juries have reached clearly contrary decisions to that of an officer clearly belies the Eighth Circuit's assertion that an arresting officer will "know to a virtual certainty" whether a live performance falls within the theatrical exception to the ordinance. The record is exactly to the contrary; the decisions should be made by neutral and detached magistrates, not police officers.

Finally, it should be noted, that, unlike all of the other cases relied upon by Respondent, the custodial arrest which would occur in

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9The omitted footnote cites two cases, relied upon by Respondent, reaching contrary conclusions.

the instant case would occur not for the purpose of initiating criminal proceedings and assuring a Defendant's appearance at trial, but rather for the expressed purpose of restraining presumptively protected speech. As noted in the original petition, under Minn. R. Crim. P. 6.01, Sub. 1(1)(a), officers are mandated to proceed by citation rather than custodial arrest for misdemeanors "unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or there is a substantial likelihood will fail to respond to a citation." As noted in the original petition, since nude dancing is virtually never likely to cause any bodily harm to the accused or another, and anyone with identification will likely respond to a citation, the only basis for a custodial arrest would be to "prevent...further criminal conduct," meaning to prevent further dance performances. Thus the very purpose of the custodial arrest is to restrain activity presumptively entitled to First Amendment protection. This is precisely what this Court's condemnation of prior restraint is intended to prevent.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the original petition, the petition for writ of certiorari should be, in all respects, granted.

Respectfully submitted,

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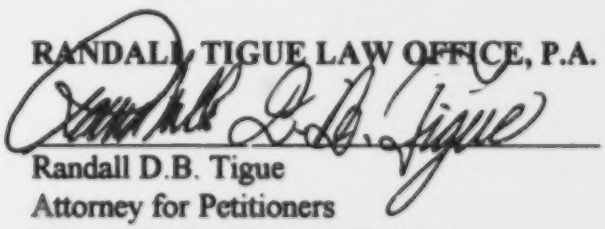

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